

**Governance Workgroup
Subgroup #2
Transcript
May 29, 2012**

Roll Call

Mary Jo Deering – Office of the National Coordinator – Senior Policy Advisor

Thank you, Operator. Good afternoon, this is Mary Jo Deering in the Office of the National Coordinator for Health IT. And this is going to be the Health IT Governance Workgroup. John, are you possibly in a car or on a speaker phone? If you could mute your phone, or somebody is. The Governance Workgroup and this is its Subgroup #2. This is a public call. If there are any members of the public on who would like to make a comment at the end, they certainly will be asked to do so. And I'll begin by taking roll. Jonah Frohlich.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

I'm here.

Mary Jo Deering – Office of the National Coordinator – Senior Policy Advisor

John Mattison.

John Mattison – Kaiser Permanente – Chief Medical Information Officer

Here.

Mary Jo Deering – Office of the National Coordinator – Senior Policy Advisor

Are there any other members of the Governance Workgroup on the call right now? Okay, would other people on the call please identify yourselves.

MacKenzie Robertson - Office of the National Coordinator

MacKenzie Robertson, ONC.

Mariann Yeager – Nationwide Health Information Network Exchange

Mariann Yeager, Exchange.

Mary Jo Deering – Office of the National Coordinator – Senior Policy Advisor

Okay, I'll turn it over to you, Jonah.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

Okay, John, it's you and me. I guess it's the two of us.

John Mattison – Kaiser Permanente – Chief Medical Information Officer

We can change everything then.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

We will shape the future of the, no, okay. So, we have a few questions left and I think we can get through these relatively quickly and they are based on eligibility criteria, by and large, the next three questions are on eligibility criteria for NwHIN participants.

So, John, would I help if I read through what the current eligibility criteria are as stated in the RFI because the questions we have to answer are, "Should there be another eligibility criterion that requires an entity have some prior experience?" "Are there other eligibility criteria to consider?" And, "Should we limit the entities that could apply?" So, there are three questions specifically around eligibility criteria. If you don't have the NVE Eligibility Criteria from the RFI in front of you and it would help I can read these out.

John Mattison – Kaiser Permanente – Chief Medical Information Officer

Yeah, that would be great, if you don't mind, Jonah.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

All right, here we go. There are about ten of them and they are, first of all, "The RFI considers the following criteria that NVEs, or NwHIN Validated Entities, must meet to be eligible," or NHIN, I'm not exactly how we're calling it. That's how they called the Nationwide Health Information Exchange Validated Entities.

So, these are the criteria: one is that they must meet all solvency and financial responsibilities requirements imposed by the statute and regulatory authorities of the state or states in which it or any of its contractors operate and serve.

The second criterion is that they make some type of financial disclosure filing. The third is they provide evidence that it has a surety bond or some other form of financial security. The fifth is that they have the overall resources and experience to fulfill its responsibilities in accordance with the CTE's when performing Health Information Exchange services. Sixth is that they have at least one year of experience, of which we've already provided comment about requiring clarification there. The seventh is that they serve a sufficient number of providers to permit a finding of effective and efficient administration. However, no prospective NVE would be deemed ineligible if it only served providers located in a single state. I'm not sure I understand that.

John Mattison – Kaiser Permanente – Chief Medical Information Officer

Yeah, I don't understand that one either.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

I'm not sure if it's been noted incorrectly, I'll just go back here. No, this is it, right out of the RFI, "Serve a sufficient number of providers to permit a finding of effective and efficient administration."

John Mattison – Kaiser Permanente – Chief Medical Information Officer

That's about the most unenforceable criterion I've ever heard of.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

I don't understand that. Okay, but I would agree with you, that's a little bit strange. The next one, they have to be a valid business or governmental entity operating in the U.S. The next is they've not had any civil monetary penalties, criminal penalties or damages imposed or been enjoined for HIPAA violation within two years prior to seeking validation. I think you and I will have something to say about that one. And we already did make note of that in the comments at the last meeting, but we weren't asked that specific question.

They not be listed on the excluded parties list system maintained by GSA, General Services Administration. That they not be listed on the list of excluded individuals and entities maintained by the Office of Inspector General. It would not be appropriate to limit to tax exempt 501(c)(3)s and some of the eligibility criteria being considered may be inapplicable to federal or state government entities, assuming that those would be potentially NVEs, I suppose.

All right. Those are the eligibility criteria. Now, question number 14 is, "Should there be an eligibility criterion that requires an entity to have prior electronic exchange experience or a certain number of participants that it serves?"

John Mattison – Kaiser Permanente – Chief Medical Information Officer

My bias would be no to both.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

Yeah, I'm not sure I see a rationale for requiring.

John Mattison – Kaiser Permanente – Chief Medical Information Officer

I would think that anything that would attend to those two criteria would have already been covered by the other criteria.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

Yeah. And I would similarly suggest that if the NVE is able to pass certification or with other qualifying criteria that this shouldn't be less relevant.

John Mattison – Kaiser Permanente – Chief Medical Information Officer

I'm sorry, say that again.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

If the NVE is able to pass whatever certification or accreditation criteria are required, that they be required then that should fulfill.

John Mattison – Kaiser Permanente – Chief Medical Information Officer

Right. I just think those are superfluous criteria. I don't understand what they would add above and beyond the existing criteria other than size, number of providers and I don't think so much would be excluded because they're setting up their own HIE in a small community and I don't see that would weed out anybody that we'd want to weed out that wouldn't be weeded out for other criteria.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

Okay. So, I'm going to note here that the Workgroup recommends that the answer is no, that anything that would tend to these two criteria should be covered by the other criteria and if the NVEs are able to pass certification accreditation that should be sufficient. Okay.

So, question 15 is, "Are there any other eligibility criteria that we should also consider?" They haven't asked us what we think about the existing criteria regarding HIPAA, for example, and joint HIPAA entity, but the way I--

John Mattison – Kaiser Permanente – Chief Medical Information Officer

I think, as we did on our last call, I think we should comment on the logistics of the HIPAA basically invalidating every large organization every two years.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

Let me read you what I had noted there and I think we'll just reference it here because it seems to apply here, but what we put down, why don't I just note it. I'll note it in the comments here so that you and the rest of the Workgroup can review it. Okay. So, I think our response here is that the Workgroup recommends that at least for the one criteria around, at least for one criteria especially around the issues of HIPAA that the logistics of HIPAA in invalidating a large organization, even if those organizations have policies and there are enforcing policies in place to ensure that they protect health information it seems very impractical and that the emphasis should be placed more on whether the entities have and are enforcing their policies around appropriate use and access of THI. Does that sound appropriate to you?

John Mattison – Kaiser Permanente – Chief Medical Information Officer

Sorry, can you hear me?

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

Yeah.

John Mattison – Kaiser Permanente – Chief Medical Information Officer

You know, I think this is a really difficult area because you would think, well, if there's been a HIPAA sanction that that's significant enough that that should disqualify an organization for all kinds of things, but unfortunately HIPAA sanctions can apply to a single individual within in a large organization, but the

sanctions are applied against the organization as a whole and so it really raises the question of what constitutes; this is two separate questions.

One is what constitutes either a reckless or a wanton disregard for HIPAA as opposed to what happens when you have 160,000 employees and you have one go rogue once in a while and the second part of the issue is who's damaged by those sanctions if, in fact, the consequence is someone can't electronically access their records from an emergency room when they had a car accident?

So, I think that needs to be part of it because I don't there's any clear and obvious answers to either one of those questions, but certainly the way it currently reads it's just impractical.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

Okay. I'll restate this in this particular response. And it sounds like we don't have; I haven't thought of other eligibility criteria that should be considered in addition to these.

John Mattison – Kaiser Permanente – Chief Medical Information Officer

No, I wouldn't want to add any more.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

Okay. And in terms of question 16, I don't see why, but I certainly don't want to end the discussion about why we should only limit, should we only limit NVEs to 501(c)(3)s?

John Mattison – Kaiser Permanente – Chief Medical Information Officer

No.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

Final question here, and I agree with that. We make up this Workgroup at this point, that's a sound recommendation.

John Mattison – Kaiser Permanente – Chief Medical Information Officer

This makes it fast. We'll set a record time.

Jan Root – Utah Health Information Network

Hey, Jonah, this is Jan Root. I'm here, too.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

Hey, Jan.

Jan Root – Utah Health Information Network

Sorry.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

It's a group of three. We are wrapping up. We're on 16. John and I both suggested it shouldn't be just limited to 501(c)(3)s. And you have no disagreement, okay. And then question 17, our last question, the optimal role of stakeholders. It's a little different. The question is, "What is the optimum role for stakeholders, including consumers, governance of the Nationwide Health Information Network, what mechanisms would most effectively implement that role."

Let me just make one other comment that they had noted in the RFI, "Throughout the history of the Nationwide Health Information Network strong emphasis has been placed on ensuring broad stakeholder participation in the network's development...." So, the question is what's the best role for stakeholders throughout this process through governance?"

Jan Root – Utah Health Information Network

Can I just ask for a little clarification about the word role?

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

That would go to ONC. My own interpretation of this is what do they have to play? What are they going to do with respect to governance? Are they going to be part of a board? Are they part of an advisory committee? Do they make decisions that impact those other participants? Are they binding? I will turn this over to Mary Jo if you have any further clarifications.

Mary Jo Deering – Office of the National Coordinator – Senior Policy Advisor

No, really I think you've hit it. You can interpret it as widely as you want.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

Okay. So, would we all, for example, suggest that the appropriate role of consumers and other stakeholders would be, for example, to perhaps as part of forming the body that accredits these NVEs or maybe it is a stakeholder group like the one that we have where we are vetting new CTEs or making decisions about retiring older ones, so it's more of a public process to have a group of experts or people like us discuss the particulars of NVEs and CTEs that they have to meet.

It could be something else. I mean, it could be something much more formal like, John, probably what you are participating in with Exchange, where there's an actual board that makes decisions about things like DURSA as I understand it. Any thought from either of you about what role you might see here as being appropriate for stakeholders?

Jan Root – Utah Health Information Network

This is Jan. I would suggest that it's very good to include consumers on these kinds of governing bodies, but I think it's very important that consumers not dominate it. Consumers have a really important perspective, but if you want it to be successful it has to actually work for the people that use it, whatever it is. And Mary Jo and I have kind of been going back and forth a little bit about what exactly is this governance things we're talking about here because I'm still not entirely sure what it is.

John Mattison – Kaiser Permanente – Chief Medical Information Officer

So, I'm sorry, go ahead, Jan.

Jan Root – Utah Health Information Network

No, that's my major thing is that the stakeholders on this board should be people that actually know what they're doing with this thing and that whatever the stakeholders are they need to be the people that are actually invested in this governance so that, one, it's real and, two, it's still responsive to the needs of the people that are going to be governed by whatever this thing is.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

Right. I mean, right now, the way that this, as I interpret the RFI, there is no formal board or governance entity that is overseeing exchanges through, I don't even know what we'll call it, but by entities that adopt a CTE. It is a completely sort of, it's kind of a freestanding association where you may choose to adopt CTEs and if there is a validation process go through a validation process, which may be voluntary or not and then you get some sort of a formal recognition that you have adopted these CTEs perhaps and then you go ahead and go forth and exchange with other NVEs.

Jan Root – Utah Health Information Network

But you see it, Jonah, as possibly a step before doing something operational like Exchange or possibly Direct or whatever?

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

It could be or it may just be a marketplace where the only involvement of external stakeholders is to vet CTEs and make sure that there's an appropriate level of oversight by whomever is ultimately accountable to the federal government, which might be ONC. So, it could be that or it could be there's actually a governing entity with elected board members and an institution, a 501 or something else that is formally making decisions about is a CTE in or out or is an NVE in or out.

Jan Root – Utah Health Information Network

Yeah, okay. I just am very mentally challenged when you get really abstract. I have to admit that I have a really hard time with that because I like real things and not just sort of theoretical policy things. But, yeah, I guess that would be the one thing I would say about it, the ultimate role for stakeholders, I like the idea of doing the CTEs and the NVEs, what is it that is something to adopt. But, again, in order to govern something, if it's a marketplace you kind of have to be selling something. There may not be any money attached to it, but you have to sell something. And I'm still not sure what this governance board is selling, if that makes any sense.

So, I would just say that stakeholder groups need to be people who understand what's going on, feet on the ground, a stake in what happens. Governance is no good when it's disconnected to consequences, so it has to be connected to consequences of decisions.

John Mattison – Kaiser Permanente – Chief Medical Information Officer

I agree with Jan. I think that any sort of governance around HIE is just going to be pretty much a prerequisite and already is a prerequisite for all of the existing HIE so there are governance groups and rules of the road for every existing HIE. They're pretty advanced and operating reasonably well. So, whenever something gets vague and abstract, as Jan was saying, you have to think about, so what problem were we trying to solve.

And the problem we're trying to solve here is one that's being solved in my experience within the participant HIEs, so whether it's a Beacon Community or state HIE or the NWHIN Coordinating Committee or the CCC or the vendor-specific ones, they each have their rules of the road and there's some permutations in what the rules of the road are between the different HIEs, but they're all credible and they have broad stakeholder input and so my assumption is that this uber governance process, if anything, may be a court of final appeal if there's a dispute between two governing HIEs or participants, but I suspect those are going to be vanishingly rare and the worst thing you want to do is start up a governance process that doesn't really have a mission.

So, I'd just be very wary of what a group like this would come up with if it's not constituted with people who are actually doing that work in their regional or statewide HIEs.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

So, it sounds like we're recommending that however governance is applied, there is a role for consumers, but it shouldn't be the only stakeholder involved. We need to see balance. There may be a role for some sort of a decision-making body to be sort of an ombudsperson, which we've stated in previous discussions we've had in this subgroup, but that is like a comment to make.

RFI doesn't contemplate necessarily a governing board. And, Mary Jo, correct me if I'm wrong, they contemplate a single body to a credit validation body, a group NVEs that will be accredited by that body that will validate entities' conformance to CTEs and that's it. So, it may be one thing we might suggest then, given the discussion we just had is that there may be a role for those who are actively, individuals with expertise who are actively involved in Exchange to either be part of this accreditation/validation body that would oversee all the NVE certifications or some role for them to provide input to either that group or ONC to support sort of dispute reconciliations.

And that sounds like, based on what I just heard from you two, like it might be the sort of the limit of the role of external stakeholders.

Mary Jo Deering – Office of the National Coordinator – Senior Policy Advisor

Just for clarification, I heard early on, it could have been you, talk about them providing input to the identification around CTEs and decisions about retiring old CTEs, so I just wanted to make sure you are not going to reference a role with regard to CTEs.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

That's a good point, too. There could be a role for them as well for determining old and new CTEs, what new CTEs to put in place, which old ones to retire. Okay, with that friendly amendment, does that sound like a recommendation we're willing to make this week. I can restate it if you want me to.

Mary Jo Deering – Office of the National Coordinator – Senior Policy Advisor

Sounds good.

John Mattison – Kaiser Permanente – Chief Medical Information Officer

So, the only question I have, Jonah, is whether we're in a position to ask the question of should participants in local HIEs have a majority membership of any such process?

Mary Jo Deering – Office of the National Coordinator – Senior Policy Advisor

Yeah, that's a good question.

John Mattison – Kaiser Permanente – Chief Medical Information Officer

I mean, I would favor that because the people who are running these HIEs locally are serving the public interest and they're boots on the ground and I would think unless they're a majority influence in that process it could easily get off track.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

Could we say that a qualification for being involved is that participants are actively engaged in local or regional or even statewide HIEs? They could be sitting on a board, they could be operators of an HIE. Does that go far enough along?

John Mattison – Kaiser Permanente – Chief Medical Information Officer

I would say that it would have to say a majority because, obviously, there may be consumer interests that are not participating in those, so there may be some stakeholders that are not currently in one of those roles, but maybe a statement that the majority should be actively involved in the HIE, one of the HIE participants.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

I would agree with that.

Jan Root – Utah Health Information Network

I would agree, too. I don't know if this is getting into too much detail or not, but we've been through a couple of consumer representative type efforts and they can be really hard to do and one of the rules that we came up with is that whoever is in the consumer role can't be employed in the healthcare industry because any time you bring anybody in as a consumer, but their full-time job is with a hospital or an association like AARP or whatever that's got a big footprint in the healthcare industry, they bring all that baggage in with them.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

Okay. Well, Mary Jo, I think we have come to the end of our questions.

Mary Jo Deering – Office of the National Coordinator – Senior Policy Advisor

I think you have and I want to congratulate you all on being so efficient and so precise.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

Well, thank you, Jan and John, for making up this rock star Workgroup.

Jan Root – Utah Health Information Network

We rock, we do.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

So, I guess we have, Mary Jo, to just open up the lines and then we can end the call.

Public Comment

Mary Jo Deering – Office of the National Coordinator – Senior Policy Advisor

Great. Thank you very much. Operator, would you open the lines for public comment.

Operator

Yes. We do not have any questions at this time.

Jonah Frohlich – Manatt, Phelps & Phillips, LLP

Great. Well, with that I want to thank everybody for participating on the call today. I'll summarize these and make sure that they're back out and Mary Jo will help get them out to the group and we'll have a chance to review them and I'll make my own comments over e-mail and we should be good to go. Thanks a lot, everybody.

Mary Jo Deering – Office of the National Coordinator – Senior Policy Advisor

Thank you.

John Mattison – Kaiser Permanente – Chief Medical Information Officer

Bye-bye.